Courts Disagree About Basic Work Product Doctrine Elements: 
Part II

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In his June 17, 2015 “Privilege Points” release, Tom Spahn discusses courts’ divergent views of the standard for overcoming opinion work product protection and the duration of work product protection:

Last week's Privilege Point discussed an important variation in courts' interpretation of the same sentence in their work product rule. Two other cases highlight additional disagreements: (1) the standard for overcoming opinion work product protection; and (2) the work product protection's duration.

In Byman v. Angelica Textile Services, Inc. (In re Sadler Clinic, PLLC), the court described courts' varied opinion work product protection levels — including the Fourth Circuit's absolute protection for such work product. Ch. 7 Case No. 12-34546, Adv. No. 14-03231, 2015 Bankr. LEXIS 1369, at *16 (Bankr. S.D. Tex. Apr. 17, 2015). But the court rejected that approach — instead applying a "compelling or extraordinary need" standard for overcoming opinion work product protection. Id. at *18-19. A few weeks earlier, a Delaware state court adopted a similar standard — finding that an adversary could overcome a litigant's opinion work product protection if the document "is directed to the pivotal issue in the litigation and the need for the information is compelling." Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co., C.A. No. 07C-12-134-JRJ, 2015 Del. Super. LEXIS 166, at *10 (Del. Super. Ct. Mar. 31, 2015). The Angelica Textile Services court also dealt with another variation — work product protection's duration. The court noted that some courts protect work product created in one litigation only in "closely related" later litigation. 2015 Bankr. LEXIS 1369, at *12. The court found that approach too narrow — instead extending work product protection "to all subsequent litigation, related or not." Id. at *13.

Because corporations normally find themselves litigation defendants, they usually do not know where they will be sued — and therefore will not know until that time which work product doctrine variation(s) the court will apply.